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E.O. 12958: N/A  
TAGS: ECON ETRD KIPR  
SUBJECT: 2009 SPECIAL 301 REVIEW: REQUEST FOR POST INPUT

¶1. SUMMARY AND ACTION REQUEST: THIS IS AN ACTION REQUEST. Post input for the annual 2009 Special 301 review is requested no later than 10:00 a.m. (Washington, D.C. time) on March 2, 2009. All Posts whose host countries/economies have been proposed by the private sector for inclusion on the Special 301 Watch List (WL), Priority Watch List (PWL), Priority Foreign Country (PFC), or Section 306 should provide an information cable addressing intellectual property protection and enforcement, including the issues raised in the submission. In addition, for Posts whose host countries/economies have been cited by the private sector in other categories not covered by Special 301, such as Special Mention or Dispute Settlement, Posts should also provide an information cable.

¶2. The deadline for private sector submissions is February 17, 2009 and they will be available on the State Intranet 2009 Special 301 website (<http://eb.state.gov/shortcut.cfm/CHJH>) as of February 20. Private sector submissions will also be available to the public at <http://www.regulations.gov>, docket number USTR-2009-0001, as of February 18, 2009. Posts are also requested to inform host governments/authorities of the launch of the 2009 Special 301 annual review process, as well as the posting of private sector submissions at <http://www.regulations.gov>. The Special 301 Committee welcomes submissions from foreign governments/authorities concerning their potential placement on the Special 301 list by 10:00 a.m. (Washington, D.C. time) on March 2, 2009. Such submissions by foreign governments/authorities are welcome, but not required, and should be posted to <http://www.regulations.gov>. See attached Federal Register Notice for instructions that foreign governments/authorities should follow to provide a Special 301 Submission (note: these are new procedures that USTR is using for the first time). END SUMMARY AND ACTION REQUEST.

#### BACKGROUND

¶3. Each spring, USTR issues the "Special 301 Report" to identify countries/economies that deny adequate and effective protection to intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. The U.S. Government (USG) makes its decisions based on private sector submissions, foreign government/authority submissions, Post input, and other information. On January 23, 2009, USTR published a Federal Register notice inviting the private sector and foreign government/authority submissions on the practices of U.S. trading partners to be reviewed under the Special 301 provisions. The text of the notice may be found at <http://frwebgate4.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=00357222071+4+1+0 &WAISaction=retrieve>.

Post input must be received by March 2, 2009 in order for the views to be taken fully into account in the interagency review process. Posts may send supplemental cables until April 1, 2009 if additional information becomes available during the review process. Please note that only Posts in countries/economies proposed by the private sector for inclusion in the 2009 Special 301 list or for other categories, such as Special Mention or Dispute Settlement,

are required to respond to this action request. Other posts, however, are welcome to make submissions should they deem such submissions to be relevant to the Special 301 review. Post comments should be unclassified wherever possible to facilitate use by the Special 301 Committee. If classified information is relevant, Posts are asked to consider sending separate cables. Posts are also asked to identify earlier, relevant cables in the reference line.

**¶4. Availability of Public Comments on State Intranet Special 301 Website:** Private sector submissions and lists of nominated countries/economies will be available to Posts on the State Intranet Special 301 website on February 20, 2009. All public submissions can be accessed at the following URL:

[http://eb.state.gov/index.cfm?fuseaction=publ\\_ic.display&shortcut=CHJH](http://eb.state.gov/index.cfm?fuseaction=publ_ic.display&shortcut=CHJH) as they become available, unclassified Post submissions, foreign government/authority submissions, USTR papers and other relevant correspondence will also be available on this Intranet website for internal State use only. Private sector submissions will also be available to the public at <http://www.regulations.gov>, docket number USTR-2009-0001, as of February 18, 2009.

**¶5. Information to be considered by Posts:** Posts are asked to address the following IPR issues, to the extent applicable, in reporting cables: countries'/economies' implementation of their obligations in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); countries'/ economies' implementation of their obligations under other international agreements to which the United States and the foreign country/economy are parties (including, where applicable, free trade agreement (FTA) obligations); efforts on data protection, specifically protection of proprietary pharmaceutical and agricultural test data against unfair commercial use; efforts against the production, distribution, import, and export of counterfeit and pirated goods, including efforts against the piracy of optical media (music CDs, video CDs, CD-ROMs, and DVDs); efforts against Internet piracy (e.g. illegal downloads, hosting of websites containing pirated materials); efforts by foreign governments/authorities to prevent the unauthorized procurement/use of computer software; any specific information available on enforcement efforts - civil, criminal, and administrative, as well as border enforcement by customs authorities - including statistics, if available; and any other relevant IPR issues specific to the foreign government/authority.

**¶6. Decision-Making Process:** From February 2009 through April 2009, the USG interagency Special 301 Committee will review the status of intellectual property protection and enforcement in specific countries/economies. The Committee will examine the private sector and foreign government/authority submissions, Post input, the National Trade Estimate reports and other materials, such as information obtained about select countries during the Special 301 Initiative, to determine which countries/economies should be identified as denying adequate and effective protection of intellectual property rights or denying fair and equitable market access to U.S. persons who rely on intellectual property protection. USTR will host interagency meetings to discuss all available information and application of the Special 301 criteria to foreign countries/economies. Following those meetings, the Special 301 Committee will formulate recommendations to the Trade Policy Staff Committee (TPSC). During the review, it is possible that Washington will request additional information/action from Posts, depending upon the direction of the interagency discussions. Throughout this process, it is important that deliberations remain confidential and that EEB/TPP/IPE serve as the sole conduit for communications between the State Department and other agencies.

**¶7. Timing of the Special 301 Announcement:** USTR will announce the results of this year's review on or about April 30. At that time USTR will make available to the

public the full report together with a press release that contains the Special 301 list and summarizes the results of the review. As in the past, EEB/TPP/IPE expects to notify Posts of the decisions prior to USTR's announcement so Posts can notify host governments/authorities.

¶8. Contact Information: Posts are asked to direct any questions or input to Jennifer Choe Groves, Office of Intellectual Property and Innovation, USTR at 202-395-4510 - [Jennifer\\_groves@ustr.eop.gov](mailto:Jennifer_groves@ustr.eop.gov); and State EEB/TPP/IPE, Timothy R McGowan. State's Special 301 Coordinator is Timothy R McGowan of EEB/IPE - 202-647-2291 - [McGowanTR@state.gov](mailto:McGowanTR@state.gov).

#### STATUTORY BASIS FOR SPECIAL 301

¶9. Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994) (Special 301), under Special 301 provisions, USTR must identify those countries that deny adequate and effective protection for IPR or deny fair and equitable market access for persons that rely on intellectual property protection. USTR must decide whether to identify countries within thirty days after the issuance of the annual National Trade Estimate Report (NTE). USTR normally announces the results of the Special 301 Review on or about April 30.

¶10. Countries/economies that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact (actual or potential) on the relevant U.S. products must be designated as Priority Foreign Countries.

¶11. Priority Foreign Countries are potentially subject to an investigation under the Section 301 provisions of the Trade Act of 1974. USTR may not designate a country/economy as a Priority Foreign Country if it is entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of IPR.

¶12. USTR has created a Priority Watch List (PWL) and Watch List (WL) under Special 301 provisions. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in the country/economy with respect to the protection or enforcement of intellectual property rights or market access for persons relying on intellectual property protection. Countries/economies placed on the PWL are the focus of increased bilateral attention concerning the problem areas. USTR's 2008 Report can be found at [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2008/2008\\_Special\\_301\\_Report/Section\\_Index.htm](http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_Special_301_Report/Section_Index.htm) l?ht=

¶13. In addition to an overall assessment of the IPR climate, Posts are asked to gather information on some specific areas of particular concern:

A) TRIPS Implementation, FTA Implementation, and Other IP-Related Issues: Washington is interested in an ongoing review of WTO Member countries'/economies' implementation of their obligations under the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

B) Data Protection: Efforts on data protection, specifically to protect undisclosed test data submitted by pharmaceutical and agricultural chemical companies for marketing approval against unfair commercial use, as well as whether marketing approvals have been granted for generic copies of patent infringing pharmaceutical products.

C) Enforcement: Adequate and effective enforcement against IP infringement of all types, including piracy and counterfeiting, and including effective border enforcement by customs authorities, is extremely important to the USG

and U.S. industries. Posts are asked to gather any statistical or other quantitative IP enforcement information that is available and information on legislative or operational initiatives, and to make an assessment of political will in this critical area.

D) Notorious Markets: Noting that global piracy and counterfeiting thrive in part due to large marketplaces that deal in infringing goods, USTR in 2006 began to list "notorious markets" in the Special 301 Report. Posts are requested to identify markets that should be considered for inclusion on or removal from this list. The list includes both virtual (online) markets and traditional physical markets. A market may be listed when information reviewed in the Special 301 process points to it as a significant example of a marketplace that has been the subject of IPR enforcement action, or indicates that it may merit further investigation for possible IPR infringements, or both.

E) Internet Piracy: Washington would appreciate Post reports on the status of Internet piracy and host government actions to combat such piracy on the Internet.

F) Production, Import, and Export of Counterfeit Goods: Efforts against the production, import, and export of counterfeited goods, including products that contain protected trademarks.

G) Optical Media Piracy (CDs, VCDs, DVDs): Washington has urged additional countries/economies, particularly those with a domestic or regional problem of significant levels of optical media piracy, to adopt regulations similar to those passed in Hong Kong, Macau, Bulgaria, Malaysia, and Ukraine. These regulations establish controls on, and require licensing of, optical media manufacturing capacity and equipment and material inputs for the purpose of controlling domestic production and export of pirate optical media. Such regulations would mandate, for example, the use of source identification (SID) codes on locally manufactured CDs.

H) Use/Procurement of Government Software: In October 1999 President Clinton issued an Executive Order requiring all government software use to comply with U.S. federal law and international agreements. Washington continues to urge countries/economies under review to follow suit, and to ensure that their use of software complies with national and international standards of copyright protection.

I) Treaties: Washington also would appreciate Post reports on the status of host government actions to ratify and/or implement the 1996 WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

**¶14. MINIMIZE CONSIDERED.**

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